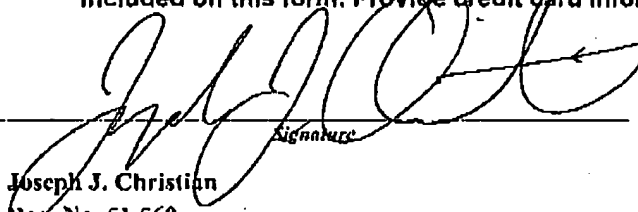


CERTIFICATE OF TRANSMISSION BY FACSIMILE (37 CFR 1.8)			Docket No. STEU-3250	
Applicant(s): Thomas D. Taggart				
Application No. 09/871,078	Filing Date 5/31/2001	Examiner Tawfik, S.	Group Art Unit 3721	
Invention: METHOD AND APPARTAUS FOR ASEPTIC PACKAGING			RECEIVED CENTRAL FAX CENTER MAR 04 2005	
<p>I hereby certify that this _____ <u>Appeal Brief (14 pages)</u> (Identify type of correspondence)</p> <p>is being facsimile transmitted to the United States Patent and Trademark Office (Fax. No. <u>703-872-9306</u>)</p> <p>on <u>3/4/2005</u> (Date)</p> <p><u>JOSEPH J. CHRISTIAN</u> (Typed or Printed Name of Person Signing Certificate)</p> <p><u>[Signature]</u> (Signature)</p> <p>Note: Each paper must have its own certificate of mailing.</p>				

TRANSMITTAL OF APPEAL BRIEF (Small Entity)					Docket No. STEU-3250
In Re Application Of: Thomas D. Taggart					
Application No. 09/871,078	Filing Date 5/31/2001	Examiner Tawfik, S.	Customer No. 5409	Group Art Unit 3721	Confirmation No.
Invention: METHOD AND APPARATUS FOR ASEPTIC PACKAGING					
<p><u>COMMISSIONER FOR PATENTS:</u></p> <p>Transmitted herewith in triplicate is the Appeal Brief in this application, with respect to the Notice of Appeal filed on: 1/4/05</p> <p><input checked="" type="checkbox"/> Applicant claims small entity status. See 37 CFR 1.27</p> <p>The fee for filing this Appeal Brief is: \$250.00</p> <p><input type="checkbox"/> A check in the amount of the fee is enclosed.</p> <p><input checked="" type="checkbox"/> The Director has already been authorized to charge fees in this application to a Deposit Account.</p> <p><input checked="" type="checkbox"/> The Director is hereby authorized to charge any fees which may be required, or credit any overpayment to Deposit Account No. 19-0513</p> <p><input type="checkbox"/> Payment by credit card. Form PTO-2038 is attached.</p> <p>WARNING: Information on this form may become public. Credit card information should not be included on this form. Provide credit card information and authorization on PTO-2038.</p> <div style="display: flex; justify-content: space-between; align-items: flex-end; margin-top: 20px;"> <div style="width: 45%;">  <p>_____ Signature</p> <p>Joseph J. Christian Reg. No. 51,560 Schmeiser, Olsen & Watts 3 Lear Jet Lane, Suite 201 Latham, NY 12110 (518) 220-1850</p> </div> <div style="width: 45%; text-align: right;"> <p>Dated: 3/4/2005</p> </div> </div>					
CC:			<div style="border: 1px solid black; padding: 5px;"> <p>I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)] on</p> <p>_____ (Date)</p> <p>_____ Signature of Person Mailing Correspondence</p> <p>_____ Typed or Printed Name of Person Mailing Correspondence</p> </div>		

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DOCKET NO. STEU-3250

THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Taggart, Tomas D.

Examiner: Tawfik, Sameh

Serial No.: 09/871,078

Art Unit: 3721

Filed: 05/31/2001

For: **METHOD AND APPARATUS FOR ASEPTIC PACKAGING**

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

BRIEF OF APPELLANT

This Appeal Brief, pursuant to the Notice of Appeal filed January 4, 2005, is an appeal from the rejection of the Examiner dated November 18, 2004.

REAL PARTY IN INTEREST

Steuben Foods, Incorporated is the real party in interest.

RELATED APPEALS AND INTERFERENCES

None.

STATUS OF CLAIMS

Claims 20, 22-39, 41-51, 53-64 and 67-73 are currently pending. Claims 22-34, 48-51, 53-62, 64 and 73 are withdrawn from consideration. Claims 45-47 are allowed. Claims 20, 35-39, 41-44, 63 and 67-72 are rejected. This Brief is in support of an appeal from the rejection of

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claims 20, 35-39, 41-44, 63 and 67-72.

STATUS OF AMENDMENTS

There are no After-Final Amendments which have not been entered.

SUMMARY OF INVENTION

The present invention relates to a method and device for automatically aseptically bottling aseptically sterilized foodstuffs. In general, independent claim 20, relates to aseptically disinfecting bottles at a rate greater than 100 bottles per minute *and* aseptically filling the bottles with aseptically sterilized foodstuffs *and* that the bottles are in an upright position during disinfecting. Specifically, claim 20 on appeal is directed to a method for automatically aseptically bottling aseptically sterilized foodstuffs comprising the steps of: providing a plurality of bottles; aseptically disinfecting the plurality of bottles at a rate greater than 100 bottles per minute wherein the disinfecting is with hot atomized hydrogen peroxide, wherein said plurality of bottles are in an upright position during disinfecting; and, aseptically filling the bottles with aseptically sterilized foodstuffs. The invention meets the various United States FDA aseptic standards and the 3A Sanitary Standards and Accepted Practices (page 9, lines 7-10). The term "aseptic" as used in the invention denotes the United States FDA level of aseptic (page 9, line 11).

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

1. Claims 20, 35-39, 41-44, 63, and 67-72 stand rejected under 35 U.S.C. §103(a) over BOSCH in view of DeStoutz (U.S. 3,934,042).

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ARGUMENT**GROUND OF REJECTION I**

Claims 20, 35-39, 41-44, 63, and 67-72 stand rejected under 35 U.S.C. §103(a) as being unpatentable over BOSCH in view of De Stoutz (U.S. Patent No. 3,934,042).

Claim 20

Appellant respectfully maintains that claim 20 is not unpatentable over BOSCH in view of De Stoutz under 35 U.S.C. §103(a).

Appellant contends that there are several arguments as to why the rejection should be withdrawn and claim 20 is in condition for allowance.

First, the Examiner has not established a *prima facie* case of obviousness, as is required under 35 U.S.C. §103(a), for the cited prior art combination does not teach or suggest all of the claim limitations. *See In re Wilson*, 424 F.2d 1382, 1385, 165 U.S.P.Q. 494, 496 (C.C.P.A. 1970) ("All words in a claim must be considered in judging the patentability of that claim against the prior art.") Specifically, the combination of BOSCH and De Stoutz does not teach or suggest *inter alia* "wherein said plurality of bottles are in an upright position during disinfecting", as in claim 20.

Clearly, De Stoutz is completely silent as to bottle positioning during disinfecting. Turning to the BOSCH disclosure, and by the Examiner's admission, the bottles in BOSCH are not in an upright position during disinfecting (See Office Action, page 3). On page 2 of BOSCH, the second sentence and the lower-right figure clearly indicate that the bottles are sterilized in an upside down position. In the Office Action, the Examiner avers that:

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“[I]t would have been an obvious matter of design choice to have modified Bosch’s method by having the bottles in an upright position during disinfecting to avoid the step of rotating the bottles and simplify the process for aseptically bottles, since applicant has not disclosed that bottles are in an upright position during disinfecting solves any stated problem or is for any particular purpose and it appears that the invention would perform equally well with disinfecting the bottle upside down as suggested by Bosch.” (sic)(Office Action, page 3-4).

Further, in the “Response to Arguments” section of the Office Action, the Examiner also states that “the examiner as set forth believes that positioning the bottles in upright or downward position is just a matter of engineering design choice. Therefore, it would have been an obvious matter of design choice to have modified Bosch’s method by having the bottles in an upright position during disinfecting to avoid the step of rotating the bottles and simplify the process for aseptically bottles.” The Examiner continues that “it is just a matter of design choice having the bottles arranged upside down or in upright position as long as they are disinfected.”

Appellant respectfully traverses the Examiner’s assertions. Appellant contends that to alter the method disclosed in Bosch to arrive at the instant invention is entirely not obvious. The Examiner has not provided any evidence as to why this is an obvious design choice. *In re Zurko*, 258 F.3d 1379, 59 U.S.P.Q.2d 1693 (Fed. Cir. 2001)(“the Board cannot simply reach conclusion based on its own understanding or experience - or on its assessment of what would be basic knowledge or common sense. Rather, the Board must point to some **concrete evidence** in the record in support of these findings”(emphasis added)).

Further, the Bosch disclosure offers a bottle position that is completely the opposite of the present invention’s bottle position. This is clearly a teaching away from the current claimed invention. There is no evidence or suggestion in Bosch as to why one would alter the bottle position to the claimed position. A prior art reference that “teaches away” from the claimed

invention is a significant factor to be considered in determining obviousness. See *In re Gurley*, 27 F.3d 551, 31 USPQ2d 1130, (Fed. Cir. 1994).

Further, Appellant contends that some of the reasoning offered by the Examiner is illogical in that it appears "circular". To wit: the Examiner's allegation that applicant has not stated any problem solved or purpose for having upright bottles; yet, the Examiner also states that having the bottles in an upright position "avoid[s] the step of rotating the bottles and simplify the process for aseptically bottles"(sic). By having bottles upright during disinfection certainly would allow for the omission of any bottle rotating equipment, as required in Bosch, and presumably this would allow for a simplified method (emphasis added). The presumption would be incorrect. For while removing rotating equipment simplifies the process in one regard (i.e., less equipment), there are other disadvantages, or difficulties created, by keeping the bottles in an upright position during disinfection. These difficulties relate to the removal of residual disinfectant from the interior of the bottle, as is required to comply with aseptic requirements, as defined by the FDA. (See e.g., page 6, line5; page 10, line 11 of specification). For the removal of residual disinfectant from the interior of the bottle is easier and, presumably, quicker when the bottles are upside down, as in Bosch, due to the aid of gravity allowing the disinfectant to exit out of the downward facing bottle opening. In the instant invention, there is no such advantage of using the aid of gravity because the upright bottles do not readily drain the remaining disinfectant from the bottle. This configuration would, thus, make it harder to obtain faster disinfection rates due to the FDA requirement to remove residual disinfectant. Thus, it is entirely not obvious to alter the bottle configuration of Bosch so as to result in the bottle configuration in claim 20. For it is not obvious to obtain the various cleanliness levels of disinfecting and of

filling *while concurrently* doing so while the “plurality of bottles are in an upright position during disinfecting”(emphasis added) as in the instant claim.

Based on the preceding arguments, Appellant respectfully maintains that the combination of BOSCH and De Stoutz does not anticipate claim 20,. In the alternative, Appellant respectfully maintains that the averred combination is not obvious. Ultimately, claim 20 is in condition for allowance.

Claims 36 and 37

Since claims 35-39, 41-43, 63, 67-69, and 71-72 depend from claim 20, which Appellant has argued *supra* to not be unpatentable over BOSCH in view of De Stoutz under 35 U.S.C. §103(a), Appellant maintains that claims 35-39, 41-43, 63, 67-69, and 71-72 are likewise not unpatentable over BOSCH in view of De Stoutz under 35 U.S.C. §103(a).

Appellant maintains that the rejection of claims 35-39, 41-43, 63, 67-69, and 71-72 under 35 U.S.C. §103(a) is improper.

Claims 44 and 70

Since claims 44 and 70 depend from claim 20, which Appellant has argued *supra* to not be unpatentable over BOSCH in view of De Stoutz under 35 U.S.C. §103(a), Appellant maintains that claims 44 and 70 are likewise not unpatentable over BOSCH in view of De Stoutz under 35 U.S.C. §103(a).

In addition with respect to claims 44 and 70, neither BOSCH nor De Stoutz disclose the

feature: "filling the aseptically disinfected bottling at a rate greater than 360 bottles per minute".

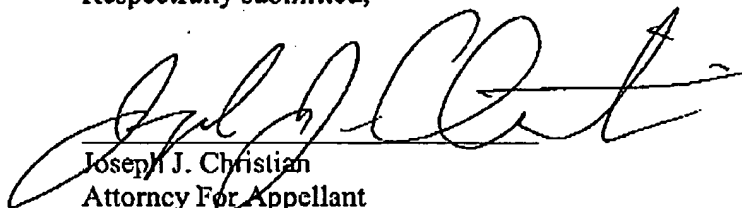
On page 3 of the Office Action, the Examiner states that the machine in Bosch "can be operated to produce 33,600 bottle per hour which is equal to 560 bottles per minute." Appellant respectfully traverses this assertion in that Appellant cannot discern where this quoted rate was obtained from. A careful reading of the Bosch disclosure discloses a maximum output range of only 200 bottles per minute. On page 2 of Bosch, it states in column 1, "sterilization machines with 6 to 30 lines, for outputs ranging from 6000 to 12000 bottles/h, depending on the filling volume." (6000 to 12000 bottles per hour equals 100 to 200 bottles per minute). The specification of Bosch, on page 4, confirms this rate for it states twice that the "Nominal throughput" to be "up to 200 bottles/min, depending on product, fill volume and neck diameter". Clearly, 200 bottles per minute is significantly and substantially less than the rate of disinfection in claims 44 and 70 of 360 bottles per minute, for 360 is nearly 100% greater than 200.

Appellant maintains that the rejection of claims 44 and 70 under 35 U.S.C. §103(a) is improper.

SUMMARY

In summary, Appellant respectfully requests reversal of the November 18, 2004 Final Office Action rejection of claims 20, 35-39, 41-44, 63 and 67-72.

Respectfully submitted,



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DOCKET NO. STEU-3250

THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Taggart, Tomas D.

Examiner: Tawfik, Samch

Serial No.: 09/871,078

Art Unit: 3721

Filed: 05/31/2001

For: **METHOD AND APPARATUS FOR ASEPTIC PACKAGING**

Commissioner for Patents
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APPENDIX A - CLAIMS ON APPEAL

20. A method for automatically aseptically bottling aseptically sterilized foodstuffs comprising the steps of:

providing a plurality of bottles;

aseptically disinfecting the bottles at a rate greater than 100 bottles per minute wherein the disinfecting is with hot atomized hydrogen peroxide, wherein said plurality of bottles are in an upright position during disinfecting; and

aseptically filling the bottles with aseptically sterilized foodstuffs.

35. The method according to claim 20, wherein the plurality of bottles are made from a glass.

36. The method according to claim 20, wherein the plurality of bottles are made from a plastic.

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37. The method according to claim 36, wherein the plastic is selected from the group: polyethylene terephthalate, and high density polyethylene.

38. The method according to claim 20, wherein the aseptic filling is at a rate greater than 100 bottles per minute.

39. The method according to claim 20, further including capping the bottle with a aseptically disinfected lid.

41. The method according to claim 20, wherein the aseptically disinfecting the bottles includes an application of the hot hydrogen peroxide spray for about 1 second into an interior of the bottle and an activation and removal of the hot hydrogen peroxide using hot aseptically sterilized air for about 24 seconds.

42. The method according to claim 20, further including a feedback control system for maintaining aseptic bottling conditions.

43. The method according to claim 20, wherein the aseptically disinfecting the bottles includes an application of the hot hydrogen peroxide spray for about 1 second onto an outside surface of the bottle and an activation and removal of the hot hydrogen peroxide using hot aseptically sterilized air for about 24 seconds.

44. The method according to claim 20, wherein the step of aseptically filling the bottles further comprises: filling the aseptically disinfected bottling at a rate greater than 360 bottles per minute.

63. The method according to claim 20, wherein the aseptically sterilized foodstuffs are not a beverage.

67. The method according to claim 65, wherein the plurality of bottles are made from one of glass and plastic.

68. The method according to claim 65, wherein the aseptic filling is at a rate greater than 100 bottles per minute.

69. The method according to claim 65, wherein the disinfecting the bottles is with hot hydrogen peroxide spray.

70. The method according to claim 65, wherein the step of aseptically filling the bottles further comprises: filling the aseptically disinfected bottling at a rate greater than 360 bottles per minute.

71. The method according to claim 69, wherein the aseptically disinfecting the bottles includes an application of the hot hydrogen peroxide spray into an interior of the bottle and an activation and removal of the hot hydrogen peroxide using hot aseptically sterilized air.

72. The method according to claim 20, wherein aseptically denotes meeting the United States FDA level of aseptic.

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APPENDIX B - EVIDENCE

There is no evidence entered by the Examiner and relied upon by Appellant in this appeal.

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APPENDIX C - RELATED PROCEEDINGS

There are no proceedings identified in the "Related Appeals and Interferences" section.

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